No. 90-906

In The

Supreme Court of the United States

October Term, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

Petitioners,

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., *et al.*,

Respondents,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The court of appeals' decision striking down the board of review under federal separation of powers principles overlooks the fact that the board of review derives its power from laws enacted by the Commonwealth of Virginia (the "Commonwealth") and the District of Columbia, which brought into being the Metropolitan Washington Airports Authority (the "Authority"). The creation of the Authority was the culmination of a long history of efforts to remove the airports from direct management and operation by the federal executive.

Prior to the creation of the Authority in 1985, Washington National and Dulles International Airports ("National" and "Dulles," respectively, or the "airports") were the only two air carrier airports in the country owned and operated by the federal government. National began operation in 1941, followed by Dulles in 1962.[1]

With the enactment of the Government Corporation Control Act of 1945, all federal agencies were directed to examine their activities to determine which activities might be more effectively operated as public corporations. An interagency study group determined that National met the criteria necessary for incorporation. Because of ongoing efforts to begin construction of a second airport in the capital area, however, introduction

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[1] For historical background, *see* Dep't Transp., Fed. Aviation Admin., Metro. Wash. Airports, *History of Past Activity Regarding Organizational and Financial Structure of the Metropolitan Washington Airports, 1945-1984* (1984).

of a bill to effect the incorporation was delayed until 1954. A Senate committee quickly reported the bill favorably, but the same proposal languished in the House. Ultimately, no action was taken on that legislation.

A new bill was introduced in 1959 providing that National and Dulles, then under construction, be incorporated under the aegis of the Federal Aviation Administration. Hearings were held during the succeeding four years, but no bill was ever reported out of committee.

These hearings, however, aired concerns that there should be more comprehensive regional planning for the airport facilities. For that reason, the momentum for mere federal incorporation began to wane. Beginning in 1969, Senators Tydings of Maryland and Spong of Virginia held hearings on the future of the capital area airports in which considerable sentiment was expressed advocating the establishment of a regional airport authority. Senator Spong thereafter introduced a bill authorizing Maryland, Virginia and the District of Columbia to form a multistate authority to operate National and Dulles, with the possible inclusion of Friendship Airport in Baltimore as well. While that bill died in committee for technical reasons, the idea of regional airports ownership remained alive.

In the meantime, the federal budget for fiscal 1972, released on January 29, 1971, contained an entry for sale of the two airports. The budget gave no details, however, as to when, how, to whom, or under what conditions the sale was to occur. Proposals for legislation could not be agreed upon and no sale was consummated.

The struggle to reconcile the national and regional aspects of the airports reached an apex in 1984 when the

federal Secretary of Transportation (the "Secretary") appointed an Advisory Commission on the Reorganization of the Metropolitan Airports (the "Commission"). The Commission, chaired by former Virginia Governor Linwood Holton, recommended that National and Dulles be leased as a unit to an independent regional authority created by the concurrent legislative action of the Commonwealth and the District of Columbia. *See* S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985) [hereinafter S. Rep. No. 193].

The Commonwealth and the District of Columbia passed legislation creating a regional airport authority to acquire National and Dulles from the federal government. Ch. 598, 1985 Va. Acts 1095, *reprinted in* App. 87a (1990 Term). *See also* District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67 (App. 119a). The Authority was to be "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction . . . enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia." Ch. 598 § 2, 1985 Va. Acts, *supra*, at 1096 (App. 89a). Further, the Authority was authorized "to acquire from the United States of America, by lease or otherwise," National and Dulles and all their related properties. *Id.* § 3.

President Reagan signed into law the Metropolitan Washington Airports Act of 1986 (the "Transfer Act") in which Congress found that the two airports were an important part of "the commerce, transportation, and economic patterns of the Commonwealth [and] the District of Columbia," that the operation of the airports by

"an independent local agency [would] facilitate timely improvements at both airports," and that "the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation." 49 U.S.C. § 2451(1), (4), (10) (1988), *reprinted in* App. 60a-61a. The Transfer Act authorized the Secretary to negotiate a long-term lease with the Authority containing minimum terms and conditions as required by Congress. *Id.* § 2454 (App. 64a).

One condition of the lease to be negotiated was the inclusion of a requirement that the nonfederal participants create a board of review representing users of the airports which were to be appointed by the Authority's board of directors from a list of members of Congress. *Id.* § 2456(f) (App. 75a). Although the list was to be provided by the Speaker of the House and the President pro tempore of the Senate, it was the Authority's board of directors which was empowered to choose members for the board of review from that list and, if no suitable candidates were listed, to direct the Speaker and the President pro tempore to submit other names.

Negotiations continued between the Secretary and the Authority and, on March 2, 1987, a lease was agreed upon consistent with both the federal and state legislation. Lease of the Metropolitan Washington Airports Between the United States of America, etc. ("Airports' Lease") (App. 163a). Both the Commonwealth and the District of Columbia then amended their earlier statutes by expressly providing for the board of review as proposed in the lease. Ch. 665 § 5(A)(5), 1987 Va. Acts 1138, 1140 (Reg. Sess.), *reprinted in* App. 110a-11a; D.C. Law 7-18 § 3(c)(2)(1987), *reprinted in* App. 140a, 142a-43a.

At the inception of the lease, the capital area comprised the sixth largest passenger market in the United States and the eighth largest in terms of passenger enplanements. At present, businesses at the airports employ more than 21,000 persons (as of June 1, 1990), provide more than $3.2 billion in business activity, pay over $468 million in annual wages and salaries, and generate many millions of dollars in tax revenues to the state and Northern Virginia localities (1987 statistics). This is in addition to the enormous economic impact produced by the millions of visitors to the capital area who arrive by way of these airports. The Commonwealth and the District of Columbia created the Authority and entered into the lease without threat or coercion; its arms-length agreement with the federal executive has been, and continues to be, of enormous economic and social benefit to the Commonwealth.

Accordingly, given the potential for disruption of normal operation, planning and development posed by the decision rendered by the court of appeals, the Commonwealth supports the Authority in urging this Court to reverse the court of appeals' decision.

SUMMARY OF ARGUMENT

The respondents created the illusion of a separation of powers problem where none exists by magnifying Congress' limited role in the Authority's creation. The court of appeals' decision reflects an inadequate deference for a political arrangement endorsed by the two political branches of state government. That decision fails

to address whether the state-created political structure of the Authority affects even minimally the dynamic balance of powers between the political branches of federal government.

In prior cases where Congress has been held to have intruded impermissibly on federal executive power, it was clear that Congress, by its own legislative fiat, had directly and substantially diminished the federal executive's power to act effectively in areas of broad national concern.

The Authority, however, had its genesis in the shared desire of the federal executive and state and local interests to relieve the federal government of vexing airport management duties that are commonly performed elsewhere by local or regional authorities. This lawful and appropriate purpose was achieved.

The central condition of the Transfer Act was that the Authority should have only "the powers and jurisdiction . . . conferred upon it . . . by the legislative authority of the Commonwealth of Virginia and the District of Columbia." 49 U.S.C. § 2456(a) (App. 71a-72a).

The Authority's mission is appropriately narrow in scope; it is narrowly constituted "solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area" (*id.* § 2456(b)(2) (App. 72a)), a condition agreed to by the Commonwealth. *See, e.g.*, Ch. 598 § 3, 1985 Va. Acts, *supra* (App. 89a).

Congress did not require a federal transfer of the airports; subject only to certain conditions, Congress left

that decision up to the federal executive. In concluding a lease of the airports with a state-created authority, the federal executive acted in circumstances where its authority is at its maximum. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). In passing mere enabling legislation that permitted without requiring an airport's transfer, Congress acted modestly in an area where its actual power is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

The Commonwealth was not coerced into accepting the board of review and both the federal lease, which was given Congress' implicit approval, and the Authority's own bylaws provide adequate assurance in accordance with governing state law that members of Congress serving in their individual capacities will exercise the board of review's limited powers solely in the interests of the users of the airports.

The court of appeals based its entire decision upon the weak reed of three words in the Transfer Act (i.e., "shall consist of" (App. 18a)), even though these are not the words the federal executive later chose to use in its practical application of the Transfer Act to the specific terms of the lease. The federal executive's interpretation of the Transfer Act's terms clearly was ignored by the court of appeals when it should have been accorded considerable deference. Congress itself has registered no reservation concerning the lease terms.

Virginia law grants an inherent removal power to an appointing body or official, except where a constitutional or statutory restraint exists. *See McDougal v. Guigon, Judge*, 68 Va. (27 Gratt.) 133 (1876); 1983-1984 Att'y Gen.

Ann. Rep. 91, 92. Accordingly, the Authority's board of directors possesses that power by virtue of being a body subject to the laws of the Commonwealth.

The governance structure of the Authority is one familiar to the Commonwealth. *See* Va. Code Ann. § 58.1-3713(B) (Supp. 1990).

Whether the Commonwealth seized spontaneously the idea of employing the services of members of Congress is irrelevant to the separation of powers issue. The Commonwealth clearly had the lawful right to employ their services under state law, and the federal constitution does not prohibit such service.

The separation of powers inquiry should address to what extent, if any, Congress has impeded the federal executive in accomplishing its constitutional functions. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). The answer in this case is clearly that the Authority's governance structure has had no such effect. While the proliferation of federal legislative measures akin to the Transfer Act could have implications for the balance of federal political power, it serves no useful purpose to "conjure up hypothetical future cases" in order to decide the instant one. *Youngstown Co.*, 343 U.S. at 597 (Frankfurter, J., concurring). The need for innovation to integrate the "dispersed powers" of government into a "workable" political structure is especially acute where the coordination of the political branches of different sovereign governments is involved. *Cf. Mistretta v. United States*, 488 U.S. 361, 386 (1989).

It was entirely appropriate that the Authority have a review body to reflect more than simply the comparatively parochial interests of the involved regional and local governments, and the expertise of members of Congress suited them for this role. *Cf. Mistretta*, 488 U.S. at 396. (" 'This is not a case in which judges are given power . . . in an area in which they have no . . . expertise' ".) *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 676 n.13 (1988)).

No appointments clause issue exists here because board of review members do not " 'exercis[e] significant authority pursuant to the laws of the United States.' " *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

Respondents resorted to this constitutionally impermissible attack on a state-created political structure in order to destroy it precisely because they cannot demonstrate that this structure has exercised its power in a manner that infringes on their rights. *See Pacific Telephone Co. v. Oregon*, 223 U.S. 118 (1912). Permitting such an attack undermines federalism and is contrary to the deference due a great commercial enterprise sanctioned by the political branches of sovereign governments. *Cf. M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).

ARGUMENT

I. Court of Appeals' Application of Separation of Powers Doctrine to State-Created Board of Review Represents Departure from This Court's Separation of Powers Jurisprudence

This is the first time that a body lawfully created under authority of state law has been found violative of the separation of powers doctrine, even though both state and federal law allow its creation. This is, perhaps, also the first time that the level of deference due a political arrangement created independent of the federal government by the voluntary cooperation of both political branches of federal government has failed to secure federal judicial sanction. It is, moreover, one of the few instances, if not the only one, in which an alleged exercise of federal executive power by members of Congress has not been given at least cursory scrutiny to determine whether it even minimally affects the dynamic constitutional balance between the political branches of federal government.

This case contrasts dramatically with the prior cases of this Court relied upon by the court of appeals in holding the board of review unconstitutional. Specifically, the Authority's board of review differs markedly both in its legal origins and in its practical effect on the balance of federal legislative and executive power from other bodies and officials whose powers have been held to intrude impermissibly on federal executive authority.

For example, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), concerned a federal elections commission established by a congressional enactment providing for

members appointed directly by Congress to exercise federal executive rulemaking, adjudicatory and enforcement powers over national presidential elections. This Court held that the commission's members' exercise of federal executive authority meant their appointments must be made in conformity with Article II, § 2, clause 2 of the Constitution of the United States. 424 U.S. at 143.

Similarly, *Bowsher v. Synar*, 478 U.S. 714 (1986), addressed congressional legislation that allocated important federal executive duties regarding the national budget to a legislative branch official subject solely to Congress' removal power. Finding "no escape from the conclusion that, because Congress . . . retained removal authority over the Comptroller General," this Court held that official could not exercise federal executive authority. *Id.* at 732.

Springer v. Phillipine Islands, 277 U.S. 189 (1928), involved a national legislative body which, while choosing to *retain* national ownership of several national corporations, enacted law shifting appointment authority over those corporations' executive officials away from the Philippine chief executive and into the national legislature's own hands. This Court held that the Phillipine legislature could not assume for itself the appointment power of its coordinate and coequal executive branch. *Id.* at 203, 205.

In each of these cases, a national legislature by legislative fiat vested itself with control over national executive bodies and/or officials who were charged with exercising broad national executive power. In each such case, it was apparent that the "hydraulic pressure" of the

legislative branch of a national government had caused it to carve out a national executive role for itself or persons over whom it exercised control that necessarily and directly diminished the national executive's own power.

None of the offending elements present in the prior cases either attended the creation of the board of review or attends today its limited oversight role in the operation of a locally oriented nonfederal authority. The federal component of the airports' transfer legislation had its genesis in the shared desire of the federal executive branch and the state and local interests to divest the federal executive of vexing proprietary duties that had diverted it from its national, and more traditional, executive functions. *See* Transfer Act (App. 60a); *see also* S. Rep. No. 193, *supra*, at 12. Both the federal executive and the representatives of important state and regional interests concluded earlier that these proprietary airport duties could be more efficiently performed by a nonfederal local or regional authority similar to those now in use throughout the nation to own and operate its larger airports. *See* S. Rep. No. 193, *supra*, at 2.

The Transfer Act set minimum conditions for the federal executive's voluntary divestment of airports ownership (i.e., a divestment to be set in motion solely by the federal executive voluntarily negotiating an airport's lease with a nonfederal authority). 49 U.S.C. § 2456(a) (App. 71a). Any lease so negotiated then required the approval of two nonfederal executives (*e.g.*, Ch. 598 § 2, 1985 Va. Acts, *supra* (App. 88a)). The central condition of the Transfer Act was that any authority assuming airports ownership should have, as the Authority does today, only

"the powers and jurisdiction . . . conferred upon it . . . by the legislative authority of the Commonwealth of Virginia and the District of Colombia." 49 U.S.C. § 2456(a) (App. 71a-72a).

The Transfer Act also provided that this state-created authority would have to be "independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the federal government." *Id.* § 2456(b)(1) (App. 72a).

Importantly, as well, the Transfer Act required that the Authority be narrowly constituted, i.e., "solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Washington Metropolitan area." *Id.* § 2456(b)(2) (App. 72a). The Virginia General Assembly and the District of Columbia's legislative body had agreed to this and other conditions. Ch. 598 § 3, 1985 Va. Acts, *supra* (App. 89a).

While respondents have focused narrowly on the Act's requirement of a board of review, as indicated above, the Transfer Act was especially noteworthy for merely authorizing voluntary divestment of action by the federal executive, for its reliance on state legislative initiatives to create the Authority, and for requiring that the Authority not only be independent of the federal government but also narrowly charged to solely operate and improve the airports.

In sum, respondents myopically focused the court of appeals' attention on Congress' legislative role in the airports' divestiture to the virtual exclusion of the more crucial and voluntary roles of both state government political branches and the federal executive branch. This

unbalanced focus on what was Congress' limited and appropriate enabling role created an illusion of a separation of powers issue where more careful analysis would have disclosed none exists. Congress neither sought to effect, nor in fact effected, through its own legislation a transfer of airport ownership and control out of federal executive hands. Moreover, Congress did not require the federal executive to effect the transfer. Accordingly, any effort to cast Congress as the central federal actor in the airports' transfer seriously distorts both legislative and political history.

The federal executive, armed with Congress' enabling Transfer Act, voluntarily pursued lease negotiations that secured the airports' transfer:

> When the President [or his delegee] acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held nonconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.

Youngstown Co., 343 U.S. at 635-37 (Jackson, J., concurring) (footnote omitted).

In setting minimum conditions regarding any transfer of airport ownership out of federal hands to be negotiated at the sole option of the federal executive, Congress itself acted modestly within the broad reach of its power under the property clause, a clause which this Court has observed grants " 'power over the public land thus

entrusted to Congress [that] is without limitations.' " *Kleppe*, 426 U.S. at 539 (quoting *U.S. v. San Francisco*, 310 U.S. 16, 29 (1940)).

II. Far from Being Agents of Congress, as Held by Court of Appeals, Members of Board of Review Are Empowered and Charged by Virginia Law to Represent Interests of Airports Users, and in Performing That Function, Are Appointed by, Accountable to, and Removable by, Board of Directors and Not Congress

Only state legislation and jurisdiction created both the Authority and its board of directors independent of the federal government. 49 U.S.C. § 2456(a)-(b)(1) (App. 72a). In turn, it is only the board of directors, no members of which are appointed by Congress, that appoints or vetoes board of review nominees and has the power to remove review board members. The entire purpose of both the Transfer Act and the state legislation creating the Authority, as well as the lease negotiated voluntarily by the federal executive and thereafter approved by non-federal executive authorities, was to permit the federal executive to divest itself of the airports' management and operation. No one can credibly argue that this purpose of federal divestiture was itself unconstitutional, or that it was not accomplished through the federal executive's voluntary lease negotiations.

Respondents attribute an incredible naivete on the part of Virginia's Governor and its General Assembly by implicitly asserting that the Commonwealth merely succeeded in trading federal executive control for federal legislative control of the airports. This was not a

situation, like that presented in *South Dakota v. Dole*, 483 U.S. 203 (1987), where a state may have understandably felt that inducement approached coercion. The Commonwealth was not forced to accept the board of review concept in order to protect an existing stream of federal revenues supporting ongoing state activities. Moreover, the Commonwealth is confident that the Authority's non-federal, state-created board of directors, the sole body empowered to appoint members of the board of review, acted lawfully under state law by providing in its resolutions both for a veto of candidates for review board membership and for the removal for cause of review board members.

The extraordinary conclusion of the court of appeals that Congress has retained the power to remove members of the board of review is not supportable. This conclusion of the court of appeals was based solely on three words of the Transfer Act. The court of appeals reasoned as follows:

> The Act specifically requires that the Board 'shall consist of' members of specified committees of the House and Senate. As each house has the right to remove any of its members from any committee at any time, Congress has the power to disqualify any one or more of them from further service on the Board.

(App. 18a). The court of appeals implicitly assumes that the phrase "shall consist of" dictates that continuing House or Senate committee membership following appointment to the board of review shall be a requirement of continuing board of review membership. This assumption is both incorrect and contradicted by the

interpretation previously adopted by the federal executive in the lease itself. It is also inconsistent with the Authority's bylaws, which are the *only* authoritative rules pertaining to this aspect of the Authority's governance.

In examining the court of appeals' incorrect threshold assumption, it is important to emphasize that the Authority's board of review is *not* governed by the Transfer Act but, rather, is governed by the Authority's bylaws and the laws of the Commonwealth. Congress neither undertook to create nor to regulate the Authority through passage of the Transfer Act; rather, Congress merely set forth certain details limiting the federal executive's negotiating latitude in leasing the airport's premises to the Authority.

These conclusions cannot be the subjects of rational dispute. The Transfer Act itself recognizes that the federal interest in the airports is to be protected contractually through a lease negotiated by the federal executive. *See* 49 U.S.C. § 2451(10) (App. 61a). The federal executive is granted authority to negotiate and enter into a lease, provided the lease is with an authority meeting the description of one contained in the Transfer Act. *See id.* § 2454(a) (App. 64a) (granting authority to lease the premises to the "Airports Authority"); § 2453(2) (App. 62a) (defining "Airports Authority" to be "a public body . . . created [in a manner] consistent with the requirements of section 2456 of this title"). Clearly, the attributes of an "Airports Authority" described by § 2456 are not brought into being by the Transfer Act but, rather, must be established wholly under state law. *See id.*

Moreover, the primary responsibility for assuring that the Commonwealth has created an appropriate

airports authority was left to the federal executive to assess as a necessary incident of its own responsibility to assure that the terms of the Transfer Act were faithfully met through a lease vehicle.

In the lease, the federal executive effectively interpreted the requirements of § 2456(f)(1) differently from the later, mistaken interpretation given it by the court of appeals. Rather than providing that the "Board of Review shall be established by the board of directors and shall consist of" members of certain congressional committees (§ 2456(f)(1) (App. 75a)), the federal executive and the Authority agreed in the lease that "the Board of Directors shall establish a nine-member Board of Review of the Airports Authority and *appoint* to it representatives of the users" and that the "Board of Directors shall *appoint*" members from certain congressional committees. Airports' Lease Art. 13, § 13.A (App. 175a) (emphasis added).

The primary role in the protection of federal interests was played by the lease. The only role Congress reserved for itself was providing that no lease may take effect unless it has first been submitted to Congress with an opportunity for it to take responsive action. 49 U.S.C. § 2454(d) (App. 70a). Congress has not been heard to complain. Accordingly, the practical and constitutional interpretation given § 2456(f)(1) by the federal executive charged with executing this law should be respected. (The court of appeals does not appear to have considered this authoritative interpretation, nor was it argued by any party in the court below.)

The Authority carried out its obligations (which were obligations under the *lease*, not under the Transfer Act) by

promulgating the lease's interpretation of § 2456(f)(1) verbatim as part of the bylaws of the Authority. Bylaws of the Metropolitan Washington Airports Authority ("Bylaws") Art. IV, Sec. 1 (App. 151a-52a).

Even if the court of appeals had found that the federal executive exceeded its authority by leasing property to an authority not meeting the Transfer Act's requirements, that fact would have been relevant only to the issue of whether the lease was an *ultra vires* exercise of federal executive power; it would not make the board of review itself an unconstitutional body.

The Authority and its bylaws are to be construed in accordance with Virginia law. Ch. 598 § 22(A), 1985 Va. Acts, *supra* (App. 104a); D.C. Law 6-67 § 23(a) (1985) (App. 137a). Those bylaws provide that the members of the board of review are to be appointed by the board of directors for six-year terms, though no provision addresses their removal. *See* Bylaws, *supra* Sec. 2 (App. 152a). Under Virginia law, where a public officer's term is established under law, removal of the officer is governed by Va. Code Ann. § 24.1-79.6 (Repl. Vol. 1985), which provides the exclusive means by which such officers may be removed. *See* 1983-1984 Rep. Att'y Gen. 466, 468. Removal under that provision requires a petition signed either by the person appointing him or by a majority of the members of the appointing authority. Va. Code Ann. § 24.1-79.6. "This is consistent with the general rule followed in Virginia that the power to appoint an officer inherently carries with it the power to remove the officer unless a constitutional or statutory restraint exists. *See McDougal v. Guigon*, 68 Va. (27 Gratt.) 133 (1876)." 1983-1984 Rep. Att'y Gen. 91, 92.

The governance structure adopted for the Authority is akin to the governance structure of the advisory committee examined in the foregoing official opinion of the Virginia Attorney General. That opinion addressed a "coal road improvement advisory committee" established pursuant to former Va. Code Ann. § 58-266.1:2(B) (now Va. Code Ann. § 58.1-3713(B) (Supp. 1990)). Although the advisory committee exercises some power regarding the governing body's action, the governing body possesses the power to remove at will any committee member it appointed. 1983-1984 Att'y Gen. Ann. Rep., *supra*, at 92. Thus, the check-and-balance roles played by the Authority's board of directors and its board of review are a familiar governance structure for public bodies created under Virginia law.

This removal power, which only the board of directors may lawfully exercise over the board of review, is adequate assurance that members of Congress whom the board of directors appoint and who serve in their individual capacities, are not agents of Congress.

Perhaps the "hydraulic pressure," also present in federal-state relations, dictated that the Commonwealth did not seize spontaneously on the idea of engaging the services of members of Congress. This unremarkable political reality, however, is surely an insufficient basis for judicially dissolving a review body that was lawfully conceived under state law and is not per se violative of the federal constitution. *Compare Kwai Chiu Yuen v. Immigration and Naturalization Service*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969) *and Signorelli v. Evans*, 637 F.2d 853, 862 (1980) *with* Va. Code Ann. § 2.1-33(8) (Supp. 1990).

III. Appointments Clause Has No Application to Case Because Members of Board of Review Are Public Officers of Commonwealth and Are Not "Officers of the United States."

There is no appointments clause issue presented by this cause because that clause does not prohibit states from creating an authority and appointing its members. As noted above in Part II, the Authority is not governed by the Transfer Act. The Authority is governed by, and draws its life from, state law. Since those members do not " 'exercis[e] significant authority pursuant to the laws of the United States,' " they are not " 'Officer[s] of the United States.' " *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d at 1365 (quoting *Buckley*, 424 U.S. at 126).

IV. Separation of Powers Issue Raised by Citizens Is Illusory; Respondents' Attack, at Its Core, Is Itself Impermissible Attempt to Enlist Federal Judicial Power to Destroy State-Created Public Body's Governance Structure for Purpose of Undermining Way in Which Structure Lawfully Exercised Power

Where an unconstitutional legislative invasion of federal executive authority is charged, the inquiry is always to what extent the legislation in issue has prevented "the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. at 443. If it is asserted that the congressionally permitted voluntary action of the federal executive that actually divested the latter of two local airports upsets that balance of federal political power, those asserting this view should articulate reasons supporting this assertion. In fact, the effect the governing structure of

the airports has on the proper balance of federal executive and legislative power is well below *de minimis*; it is nil. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986) (where intrusion into powers of federal judicial branch found *de minimis*, no separation of powers problem exists).

The respondents have sought to avoid answering this central issue by hoisting a spectre of Congress later resorting to other similar legislative measures which, they claim, could pose a palpable threat to the proper separation of federal executive and legislative political powers. "While in the abstract a proliferation" of schemes by Congress to devolve federal property on state-created bodies subject to oversight authority of members of Congress might threaten the proper separation of political powers between the political branches of federal government, "that danger is far too remote for consideration here." *Mistretta*, 488 U.S. at 407. This Court has long recognized how "unprofitable . . . it is to conjure up hypothetical future cases" in order to resolve present constitutional issues. *Youngstown Co. v. Sawyer*, 343 U.S. at 597 (Frankfurter, J., concurring). Moreover, the board of directors' removal-for-cause power, a power not inconsistent with the lease terms, should be seen as "specifically crafted to prevent" Congress itself "from exercising 'coercive influence' over" this nonfederal independent political subdivision. *Mistretta*, 488 U.S. at 411.

Because the airports are important gateways to the nation's capital, there exists a genuine and, perhaps, unique need for a political mechanism to reflect users' interests as opposed to the comparatively more parochial interests of the involved regional and local governments.

A board of review composed of members of Congress assures the Authority of users' representatives who themselves are the frequent users of airport services. *Mistretta*, 488 U.S. at 396 (quoting *Morrison v. Olson*, 487 U.S. at 676 n.13) (" 'This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise.' ").

What actually is proposed by respondents is that the federal judiciary cause a state-created body to be dissolved or refashioned along lines which, they implicitly assert, would render it unobjectionable when subjected to a federal separation of powers analysis. This Court, however, has consistently refused to concern itself with the contours of state-created political bodies, except when they actually exercise power in a manner infringing upon some fundamental right of a citizen guaranteed by the federal constitution. *See Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) ("[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."). "It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States." *Id.* at 256 (Frankfurter, J., concurring). The Commonwealth long ago determined the extent of prohibitions appropriate to the service of members of Congress within state-created bodies. *See* Va. Code. Ann. § 2.1-33(8) (Supp. 1990).

While, in general, federal legislators are not permitted to hold "any office of honor, profit or trust under the Constitution of Virginia" (Va. Code Ann. § 2.1-30 (Repl.

Vol. 1987)), a specific exemption permits a federal legislator to be a "member or director of any board, council, commission or institution of the Commonwealth who serves without compensation except one who serves on a per diem compensation basis." Va. Code Ann. § 2.1-33(8).

Respondents, therefore, have no standing to raise the essentially political issue of how the Commonwealth chooses to distribute power in a political structure it creates among members of Congress serving in their individual capacities.

As early as 1911, this Court encountered a litigant, like the respondents before it today, that was seeking to destroy a political structure erected by a state solely because of its disagreement with some action taken within that political structure. *See Pacific Telephone Co.*, 223 U.S. at 118. This Court grasped immediately that the litigant's constitutional attack on the state's political structure raised a political question by which the litigant could attack indirectly an utterly unremarkable, though disagreeable, tax law. This Court's response was to prohibit that constitutional attack:

> How better can be broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into

> operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

223 U.S. at 150-51.

The respondents likewise are at a loss to articulate how the political structure of the state-created Authority contributes to their unhappiness with the duly adopted master plan's alleged role in the production of noise and safety problems. Like the litigant in *Pacific Telephone Co.*, however, they have readily discerned that the effective destruction of the political body that had exercised power in a manner they deemed objectionable would relieve them of the necessity of proving that some specific exercise of power had infringed *their* rights.

Permitting private parties to avoid pleading an infringement of their *own* rights in favor of allowing them merely to attack directly the federal constitutionality of a state-created political structure would effectively destroy our federal system:

> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.

Youngstown Co., 343 U.S. at 594 (Frankfurter, J., concurring).

Where a commercial enterprise like this Authority has come into being, much deference is required to be accorded its legislative underpinnings by the federal judiciary. *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) at 400-01. That deference should increase where, as here, the political will of the legislative and executive branches of a nonfederal sovereign was deliberately enlisted by the federal political branches to set the enterprise in motion.

CONCLUSION

Presumably lacking any basis for charging an infringement of their own rights, respondents have resorted to the broadest of constitutional attacks on a state-created political structure to destroy it. If they succeed, the damage done to our federal system and the

commercial enterprise erected within it will be out of all proportion to any transitory gain appellees may achieve.

Respondents' "fears for the fundamental structural protections of the Constitution prove, at least in this case, to be more 'smoke than fire' ". *Mistretta*, 448 U.S. at 384. The board of review poses no threat whatsoever to the dynamic balance struck in the constitution between the political branches of federal government. The Authority does not exercise federal executive authority, let alone broad federal executive authority, in areas of broad national concern. It exists "solely to operate and improve" two airports serving the metropolitan Washington area. Ch. 665 § 5(B), 1987 Va. Acts, *supra* (App. 113a). It closely mirrors the governmental structure of airports across the nation.

Amicus respectfully urges this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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